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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 101

CHARLES G. RAIBLE,
PETITIONER,

v.

PUERTO RICO INDUSTRIAL DEVELOPMENT COMPANY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

LUIS E. DUBON
Counsel for Petitioner
P. O. Box 3328
San Juan, Puerto Rico

DUBON & DUBON
LUIS E. DUBON, JR.
A. TORRES BRASCHI
of Counsel
P. O. Box 3328, San Juan, P. R.

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PUERTO RICO INDUSTRIAL DEVELOPMENT COMPANY,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

CHARLES G. RAIBLE, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above entitled case on February 26, 1964.

Opinions Below

The opinion of the Circuit Court of Appeals for The First Circuit is unreported and is printed in Appendix A infra, page 13. The judgment of the Circuit Court of Appeals is also printed in Appendix A page 15. The order of the United States District Court for the District of Puerto Rico, is set forth in R. pp. 53-56.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on February 26, 1964. Appendix A, infra, page 13. The jurisdiction of the Court is invoked under 28 USC 1254 (1). Motion for Stay of Mandate was denied by the Circuit Court of Appeals on March 17, 1964, and Mandate issued on the same day. On March 3, 1964, on Motion of the Petitioner, the District Court stayed further proceedings for a term of 30 days to enable the Petitioner to apply to this Court for a Writ of Certiorari. Appendix B, infra, p. 16.

Question Presented

The question presented in this case is whether under a lease contract in which the obligation of the lessee to pay rent is conditional, the obligation of his several guarantor can be pure and simple and immediately demandable although the condition has not been fulfilled, in view of express provisions of the Civil Code of Puerto Rico that declare that no surety may bind himself to more than the principal debtor as to quantity as well as to the burden of the conditions and that should the surety shall have bound himself for more, his obligation shall be reduced to the limits of that of the debtor.

Statutes Involved

The Statutes involved are the following:

"Every obligation, the fulfilment of which should not depend upon a future or uncertain event or upon a past event, unknown to the parties in interest, shall be immediately demandable.

Every obligation, containing a condition subsequent, shall also be demandable without prejudice to the effect of the performance."—Sect. 1066, Civil Code, 31 L.P.R.A. 3041. Derivation. Spanish Civil Code, Art. 1113.

"In conditional obligations, the acquisition of rights, as well as the extinction or loss of those already acquired, shall depend upon the event constituting the condition."—Sect. 1067, Civil Code, 31 L.P.R.A. 3042. Derivation. Spanish Civil Code, Art. 1114.

"The contracting parties may take the agreement and establish the clauses and conditions which they may deem advisable, provided they are not in contravention of law, morals, or public order."—Sect. 1207, Civil Code, 31, L.P.R.A. 3372. Derivation. Spanish Civil Code, Art. 1254.

"By security a person binds himself to pay or perform for a third person in case the latter should fail to do so.

If the surety binds himself jointly * with the principal debtor, the provisions of subchapter IV, chapter 245, of this title shall be observed."—Sect. 1721, Civil Code, 31 L.P.R.A. 4871. Derivation. Spanish Civil Code, Art. 1822.

"A surety may bind himself to less but not to more

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*Obviously a mistranslation, as the Spanish text reads "solidariamente", i.e. "solidarilly."

than the principal debtor as to quantity as well as to the burden of the conditions.

Should he have bound himself for more, his obligation shall be reduced to the limits of that of the debtor."—Sect. 1725, Civil Code, 31 L.P.R.A. 4875. Derivation. Spanish Civil Code, Art. 1826.

"The surety can not be compelled to pay a creditor until application has been previously made of all the property of the debtor."—Sect. 1729, Civil Code, 31 L.P.R.A. 4891. Derivation. Spanish Civil Code, Art. 1830.

"The extension granted to the debtor by the creditor, without the consent of the surety, extinguishes the security."—Sect. 1750, Civil Code, 31 L.P.R.A. 4955. Derivation. Spanish Civil Code, Art. 1851.

Statement

The Respondent, Puerto Rico Industrial Development Company, filed suit before the Superior Court of Puerto, San Juan Part, which was later removed on diversity of citizenship to the United States District Court for the District of Puerto Rico, to collect $48,000.00 from the Petitioner, as gratuitous guarantor for the payment of the rentals up to that amount, accruing under a lease contract executed February 26, 1957 (R. pp. 31-53) between the Respondent, as lessor, and Standard Steel and Wire Company, Inc. (hereafter referred to as 'Standard'), as lessee.

Clause 37 A of the Lease Contract (R. p. 43), provides that the agreed rental shall be payable by Standard on April 1st. of each year, commencing on April 1st., 1958, in respect to the preceding year, out of annual net income, as therein defined, "but only if annual net income shall be sufficient for the payment thereof."

On Motion of the Petitioner and upon the pleadings and affidavits on file, which showed that the net annual income of Standard was and never had been sufficient to pay the agreed rental of $70,000.00 per annum, the District Court entered summary judgment dismissing the complaint. R. pp. 53-56. In an accompanying opinion to its order granting the motion for summary judgment, the District Court rejected the contention of the Respondent that parol evidence was necessary relative to the background and prior history up to the execution of the Lease Contract, which it found to be clear and unambiguous, and held that the case presented an uncomplicated situation of principal and surety and that as a matter of law, pursuant to section 1725 of the Civil Code of Puerto Rico, 31 L.P.R.A. 4875, the Petitioner's obligation could not be more than that of the principal debtor, who under the annual net income clause was under no obligation to pay rent.

On appeal, the Circuit Court of Appeals for the First Circuit reversed and remanded the case for further proceedings. Appendix A, infra, page 13. In an opinion that will not be published because it was considered lacking of value for citation purposes (see note at the beginning of Appendix A, infra), the Court of Appeals construed the Petitioner's undertaking to be to pay any amount, up to $48,000.00, that Standard did not pay, irrespective of what was Standard's legal obligation. It went on to say that the contract was not the ordinary one of suretyship but rather one in which the Petitioner undertook to supplement Standard's obligations and that the use of the word 'guarantee' did not destroy or limited its plain meaning. It concluded stating that, on the pleadings themselves, it was not the Petitioner that was entitled to summary judgment, but the Respondent.

Reasons for Granting this Writ

Among the different kinds of obligations classified by the Civil Code of Puerto Rico are those which are pure and those which are conditional. A pure obligation is one that is immediately demandable because its fulfilment does not depend upon a future or uncertain event or upon a past event unknown to the parties in interest. Section 1066, Civil Code, ante, p. 3. A conditional obligation is one in which the acquisition of rights or the extinction or loss of those already acquired shall depend upon the event constituting the condition, Sect. 1067, Civil Code, ante, p. 3.

In this case there are involved a principal contract of lease and an accessory contract of guarantee for the payment of the rent accruing under the former. The obligation of Standard as debtor under the principal contract, however, is conditional, as its fulfilment depends upon the future or uncertain event that there be sufficient annual net income for the payment thereof.

Conceding, arguendo, that the Circuit Court of Appeals was correct in regarding the accessory contract of guarantee as an undertaking of the Petitioner to pay any amount up to $48,000.00 that Standard did not pay, irrespective of what was Standard's legal obligation, whether anything or nothing, it is nevertheless an undertaking to pay for another in case the latter should fail to do so, and as such within the provisions of the Civil Code of Puerto Rico pertaining to the contract of Security, which are found in part XIV thereof, Sections 1721-1752, 31 L.P.R.A. 4871-4957, the pertinent provisions of which are cited ante, pp.

Under the Civil Code of Puerto Rico a surety may bind himself severally with the principal debtor, thus becoming a principal debtor himself although no consideration may have moved from the creditor to him. *de la Torre* v. *National City Bank*, 49 P.R.R. 548, affirmed 91 F.2d. 399

(1 cir.). In such cases the provisions of the Code relating to Security are not applicable and those pertaining to Several and Joint Obligations must be observed. Section 1721, Civil Code, 31 L.P.R.A. 4871, ante, p. 3. The provisions relating to several and joint obligations which are found in sections 1090 to 1101 of the Civil Code (31 L.P.R.A. 3101 to 3112), are not pertinent to this case, as the Petitioner herein did not bind himself as a several debtor with Standard. Although under the Lease Contract Standard, as lessee, assumed numerous obligations toward the Respondent, as lessor, the Petitioner's sole obligation was to "jointly and severally guarantee to the [Respondent] rent in the amount of $48,000.00 for each 12 months less an amount equal to the rent received by the [Respondent] from [Standard] during each 12 months; " R. p. 45.

The Lease Contract is contained in a printed form bearing the letterhead of the Respondent. R. p. 31. It was obviously drafted by the Respondent and must be construed most strongly against him. *Torres* v. *Puerto Rico Racing Corp.*, 40 P.R.R. 423. The terms "guarantee" and "guarantor" were of the choosing of the Respondent and the drafting of Clause 38 shows that said words were not used loosely or unadvisedly. Any doubts thereof are dispelled by a reading of paragraph 3 of said Clause (R. pp. 45-46) wherein the Petitioner, as guarantor, waives certain rights provided by the Code for the protection of sureties, such as discharge from the obligation in the event extensions are granted to the debtor without the consent of the surety (Section 1750, ante, p. 4) and application of all of the debtor's property as a prerequisite before the creditor can demand payment from the surety (Sect. 1729, ante, p. 4); *Colon* v. *Porto Rican and American Insurance Co.*, 63 P.R.R. 332.

Under the laws of Puerto Rico, which control the interpretation of the Lease Contract pursuant to Clause 20

thereof (R. p. 39), freedom to contract exists insofar as the laws, morals or public order are not infringed. Section 1207 of the Civil Code, ante, p. 3, *Clausells* v. *Commercial Assurance Co.*, 1927, 37 P.R.R. 110. The Petitioner's guarantee, as construed by the Court of Appeals, is in violation of Section 1725 of the Civil Code of Puerto Rico, ante, p. 4, which limits the obligation of a surety to that of the principal debtor as to quantity and as to burden of the conditions, and which directs that should the surety have bound himself for more, his obligation shall be reduced to the limits of that of the debtor. Thus, under the plain wording of said section, if Standard's annual net income during a particular 12 months period is sufficient to pay but $6,000.00, the Petitioner's obligation is to pay just that amount and nothing more and if Standard has no annual net income and thus is under no obligation to pay, the Petitioner is likewise under no obligation to pay.

The Supreme Court of Puerto Rico looks to eminent spanish authors for the proper interpretation of such portions of the Civil Code of Puerto Rico as are copied literally from the Civil Code of Spain. *Bonillerse* v. *Gonzalez*, 17 P.R.R. 1084, 1090. Section 1725 of the Civil Code of Puerto Rico is copied verbatim from Section 1826 of the Civil Code of Spain (See note to section 4875, L.P.R.A. Title 31) and for the proper interpretation thereof, the District Court, in its order granting the Motion for Summary judgment, quoted from the learned commentator Manresa, whose opinion regarding the extent of the provisions of Section 1826 of the Civil Code of Spain is, in short, that it would be absurd for a surety to become liable when the principal debtor is not. R. p. 56.

Federico Puig Pena, another eminent author, states in his Treatise on Spanish Civil Law (Editorial Revista de Derecho Privado, Madrid, 1951) Volume IV, Part II, pp. 484-485, as follows:

[Spanish text and official translation thereof are set forth in Appendix C, infra, pp. 17, 18]

Translation:

"Consequences of the accessoriness of suretyship are also the following:

(a) The surety may bind himself to less, but not to more than the principal debtor, not only as to quantity but also as to the burden of the conditions (Section 1826, par. 1). The *plus* in the security may be 'an obligation to more *in re*', as when a larger amount than that owed by the debtor is guaranteed; 'an obligation to *more in loco*', as when the obligation is to pay in a place more favorable to the creditor; 'an obligation to more *in tempore*', as when the obligation is to pay before the debt becomes due; and 'an obligation to more *causa*', as when the obligation of the surety is pure while that of the debtor is conditional.

On the other hand, doctrine permits the surety to strengthen the undertaking by adding to it pledge, mortgage or penal clause, even though the principal obligation may not require these guaranties.

What happens when the surety binds himself to more? The Code provides that "his obligation shall be reduced to the limits of that of the debtor" (Section 1826, par. 2). It is convenient, however, to bear in mind that it is quite different to be bound to more than it is to answer for the consequences derived from the debtor's nonperformance (Judgment of the Supreme Court of Spain, January 12, 1910), as the surety indeed is liable for those consequences, as we shall see later on.

2. Subsidiariness.—The contribution of the surety to the *vinculum* established is not *merely to pay* but rather *to pay if the debtor does not pay;* that is, his intervention is merely subsidiary. For this reason he has in his favor *the benefit of application*, whereby the creditor's claim is referred to the property of the debtor for collection in equivalent prestations. From ancient times it has been admitted that this characteristic of subsidiariness may be waived and that the surety may bind himself severally with the debtor. In such cases he loses the benefit of application and the creditor may claim forthwith against him. But, does this mean that because of this waiver he becomes a principal debtor? Section 1822 of our Code thus seems to indicate, but doctrine has consistently maintained that although the surety may lose his benefit of application he does not thereby lose his quality as a surety. This doctrine has been ratified by our jurisprudence, which has held:

> (a) That notwithstanding the several obligation of a surety with the principal debtor, the contract does not lose its own nature thereby. (Judgment of December 29, (1898).
>
> (b) That as a result thereof, the several surety retains against the debtor all the rights and actions appertaining to him by reason of the contract of suretyship (Judgment of April 21, 1931). The same is not true with regard to the debtor *in solidum*, himself, whose claim against his co-debtors is limited to the share pertaining to each one in the obligation, with interest on the amounts advanced (Section 1145, par. 1)."

In the light of the above interpretation of Section 1822 and 1826 of the Civil Code of Spain, equivalent to Section 1721 and 1725 of the Civil Code of Puerto Rico, the Petitioner's liability to pay for Standard can not arise until Standard itself becomes liable, for which it is a condition precedent that it have sufficient annual net income. Until that condition is fulfilled, the petitioner is under no obligation to pay, otherwise, the absurd situation mentioned by MANRESA (R. p. 56) would arise: a surety whose obligation is pure and simple whereas that of his principal is conditional.

Such was the conclusion arrived at by the Court of Appeals, without citing a single authority in support thereof and in disregard of the plain fact that the District Judge is a member of the Puerto Rico Bar, whose statement of what the law of Puerto Rico is, is given special weight by this court, *Bernhardt* v. *Polygraphic Company of America*, 350 U.S. 198, 100 L. Ed. 199, 76 S. Ct. 273; that there was no federal question involved and the court had jurisdiction solely because of diversity of citizenship *Erie* v. *Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817; and that the Rules of Decisions Act, 28 USCA 1652, commands Federal courts to regard as "rules of decisions" the substantive "laws" of the appropriate state, except only where the Constitution, treaties or statutes of the United States provide otherwise. *King* v. *United Commercial Travellers of America*, 333 U.S. 153, 92 L. Ed. 608, 68 S. Ct. 488. Although there are no decisions of the Supreme Court of Puerto Rico determinative of the question involved in this case, said court will have occasion to pass upon it when the other suit between the same parties and for the same claim, now pending before the Superior Court of Puerto Rico, San Juan Part (Paragraph 9, Amended Complaint, R. p. 11) reaches that Court. When it does, the disregard by the Court of Appeals of the substantive provisions of

the Civil Code of Puerto Rico, applicable to the situation of principal and surety involved in this case may significantly affect the result of this litigation, *Guaranty Trust Company of New York* v. *York*, 326 U.S. 99, 89 L. Ed. 2069, 65 S. Ct. 1464, in view of the deference that the Supreme Court of Puerto Rico accords to the commentators of the Civil Law who, as quoted supra, support the holding of the District Court.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted

Luis E. Dubon
Counsel for Petitioner
P. O. Box 3328
San Juan, Puerto Rico

Dubon & Dubon
Luis E. Dubon, Jr.
A. Torres Braschi
of Counsel
P. O. Box 3328, San Juan, P. R.

Appendix A

(NOTE: Because of its lack of value for citation purposes this opinion will not be published.)

United States Court of Appeals
For the First Circuit

No. 6156.

PUERTO RICO INDUSTRIAL DEVELOPMENT COMPANY,

PLAINTIFF, APPELLANT.

v.

CHARLES G. RAIBLE,

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Before WOODBURY, *Chief Judge*, and MARIS* and ALDRICH, *Circuit Judges*.

Juan Enrique Geigel, with whom *Guillermo Silva*, *Jaime A. Garcia Blanco*, *Hernan G. Pesquera* and *Vicente Santori Coll* were on brief, for appellant.

L. E. Dubon, with whom *Luis E. Dubon, Jr.*, *A. Torres Braschi* and *Dubon & Dubon* were on brief, for appellee.

OPINION OF THE COURT.

February 24, 1964.

ALDRICH, *Circuit Judge*. This is an action by a lessor (Pridco) for recovery upon a so-called contract of "guarantee" executed by defendant Raible in connection with a lease. The rental obligation of the lessee (not a party to the suit) was on a percentage basis, but the percentage

*Sitting by designation.

was to be of the lessee's net, not of its gross, income. Nor was the defendant's guarantee the customary undertaking of suretyship. It provided as follows:

> "GUARANTEE: In order to induce Landlord to enter into this lease, Mr. C. G. Raible, as Guarantor herein, does hereby jointly and severally guarantees [sic] to the Landlord rent in the amount of $300,000 payable in the amount of $48,000 for each 12 months[1] less an amount equal to the rent received by the Landlord from the Tenant during each 12 months; .... The intention of the parties is that this paragraph shall be in conformity with the Guarantor's Dec. 12/56 agreement with PRIDCO."

The material portion of the agreement of December 12, 1956 so referred to provided,

> "(c) Mr. Raible's said personal guaranty to Prideo will operate as follows:
>
> If any particular year during the term of the lease Contract between the 'New Company' and Prideo, the rental payable thereunder by the 'New Company' to Prideo shall amount to less than $48,000, Mr. Raible will pay to Prideo whatever amount shall be necessary to complete the said amount of $48,000."

Prideo, in its complaint, alleged that the lessee had earned no net income, and hence had paid no rent under the lease, and sought recovery on the guarantee. The defendant admitted the plaintiff's principal allegations of fact but replied that the ordinary undertaking of a surety is to pay what the principal owes, and no more, and that since the lessee owed nothing, neither did he. This raised only a question of law, and defendant moved for summary judgment. The motion was granted and Prideo appeals.

In allowing defendant's motion the district court held,

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[1] The lessee's obligation, if its net income warranted it, was to pay annual rent up to $70,000.

inter alia, that the guarantee was unambiguous, and excluded an affidavit offering parole evidence as to the intention of the parties. In an accompanying opinion it stated that paragraph (c), *supra*, "simply means that defendant, in the event . . . . [lessee] earned Annual Net Income insufficient to pay $48,000.00, and paid plaintiff less than $48,000.00, defendant, as guarantor, would pay the difference." Seemingly this meant that if the lessee incurred an obligation of, say, $8,000, and paid it, the guarantor would be required to pay $40,000 (or if the lessee failed to pay even the $8,000 the defendant would be liable, we assume, for $48,000), but that if the lessee incurred no obligation whatever, defendant's liability would be nothing. The defendant does not concede even such a scope to the agreement, but says that if the lessee's liability had been $8,000 defendant's obligation would have been limited to $8,000, and even this amount only if the lessee failed to pay.

We cannot accept either construction. We regard defendant's undertaking to be to pay any amount, up to a total of $48,000, that the lessee did not pay, irrespective of what was the lessee's legal obligation, whether anything or nothing. The contract was not the ordinary one of suretyship, but something quite different, or, more exactly, additional. On its face the defendant undertook to supplement the lessee's obligations, and thus offer the lessor some partial protection [2] if the lessee failed to earn sufficient net income. This plain meaning was not destroyed, or limited, by the use of the word "guarantee." In our opinion on the pleadings themselves it was not the defendant that was entitled to summary judgment, but the plaintiff.

Judgment will be entered vacating the judgment of the District Court and remanding the action for further proceedings consistent herewith.

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[2] See fn. 1, *supra*.

Appendix B

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

Date April 3, 1964 Judge Clemente Ruiz Nazario
Reporter Maxine M. Auld

P. R. Industrial
Development Co.
Plaintiff
vs.
Charles G. Raible
Defendant

For defendant A. Torres Braschi
Civil 34-62
Cr.
For plaintiff H. Pesquera

Hearing on motion of plff. for summary judgment is continued for 30 days in order to give deft. an opportunity to seek a review of the order in lieu of formal mandate of the U. S. Court of Appeals.

(s) M. O. APONTE
Deputy

Attest: A True Copy
MARY AGUAYO
Clerk, U. S. Dist. Court
By: (s) ROSA C. MEDIA
Deputy

[SEAL]

Appendix C

Excerpts from FEDERICO PUIG PEÑA, Treatise on Spanish Civil Law, Editorial Revista de Derecho Privado, Madrid, 1951, Volume IV, Part II, pages 484-485:

Consecuencias del carácter de accesoriedad de la fianza son, además, las siguientes:

a) El fiador puede obligarse a menos, pero *no a más* que el deudor principal, tanto en la cantidad como en lo oneroso de las condiciones (artículo 1826, p.°1.°). El *plus* en el afianzamiento puede ser un "obligarse a más *in re*", como si garantiza mayor cantidad que la debida por el deudor; "un obligarse a más *in loco*", como si se obliga a pagar en lugar más favorable para el acreedor; "un obligarse a más *in tempore*", como si se compromete a pagar antes del vencimiento de la obligación, y "un obligarse a más *in causa*", como si respondiese puramente de una obligación condicional.

En cambio, la doctrina admite que el fiador puede reforzar su compromiso añadiendo a la estipulación prenda, hipoteca o cláusula penal, sin que estas garantías aparezcan exigidas en la obligación principal.

¿Qué ocurrirá si el fiador se obliga *a más?* El Código establece que "se reducirá su obligación a los límites de la del deudor" (art. 1826, p.°2.°). Conviene, sin embargo, tener presente que no es lo mismo obligarse *a más* que responder de las consecuencias que se deriven del incumplimiento de su obligación por parte del deudor (12 enero 1910), pues de estas consecuencias sí responde el fiador, como tendremos ocasión de ver más adelante.

2. La subsidiariedad.—La contribución del fiador al vínculo establecido no es simplemente *un pagar*, sino *un pagar si el deudor no paga;* es decir, que su intervención es meramente *subsidiaria*. Por eso tiene a su favor el *beneficio de excusión*, por virtud del cual remite la pretensión del acreedor a los bienes suficientes del deudor para que pueda hacerse cobro en prestación equivalente. Pero ya desde antiguo se admite que esta nota de subsidiariedad es renunciable, y que el fiador se puede obligar *solidariamente* con el deudor. Entonces pierde el beneficio de excusión, y el acreedor, lógicamente, puede dirigirse inmediatamente contra él. Pero ¿ello indica que por esta renuncia se transforma en un deudor principal? Así parece entenderse de lo prescrito en el artículo 1822 de nuestro Código; pero la doctrina insiste en que, a pesar de que el fiador pierda el beneficio de excusión, no por eso pierde su condición de fiador. Esta doctrina ha sido ratificada por nuestra jurisprudencia, que ha declarado:

a) Que no obstante la obligación solidaria del fiador con el deudor principal, no pierde por ello el contrato su propia naturaleza (29 diciembre 1898).

b) Que, como consecuencia de lo anterior, el fiador solidario conserva contra el deudor *todos* los derechos y acciones que por razón del contrato de fianza le corresponde (21 abril 1931). Cosa que no ocurre con el propio deudor in solidum que no puede exigir de sus codeudores más que la parte que a cada uno de ellos corresponda en la obligación, con los intereses del anticipo (art. 1145, p 1.°).

Translation:

"Consequences of the accessoriness of suretyship are also the following:

(a) The surety may bind himself to less, but not to more than the principal debtor, not only as to quantity but also as to the burden of the conditions (Section 1826, par. 1). The *plus* in the security may be 'an obligation to more *in re*', as when a larger amount than that owed by the debtor is guaranteed; 'an obligation to *more in loco*', as when the obligation is to pay in a place more favorable to the creditor; 'an obligation to more *in tempore*', as when the obligation is to pay before the debt becomes due; and 'an obligation to more *in causa*', as when the obligation of the surety is pure while that of the debtor is conditional.

On the other hand, doctrine permits the surety to strengthen the undertaking by adding to it pledge, mortgage or penal clause, even though the principal obligation may not require these guaranties.

What happens when the surety binds himself to more? The Code provides that "his obligation shall be reduced to the limits of that of the debtor" (Section 1826, par. 2). It is convenient, however, to bear in mind that it is quite different to be bound to more than it is to answer for the consequences derived from the debtor's nonperformance (Judgment of the Supreme Court of Spain, January 12, 1910), as the surety indeed is liable for those consequences, as we shall see later on.

2. Subsidiariness.—The contribution of the surety to the *vinculum* established is not *merely to pay* but rather *to pay if the debtor does not pay;* that is, his intervention is merely subsidiary. For this reason he has in his favor *the benefit of application*, whereby the creditor's claim is referred to the property of the debtor for collection in equivalent prestations. From ancient times it has been admitted that this charac-

teristic of subsidiariness may be waived and that the surety may bind himself severally with the debtor. In such cases he loses the benefit of application and the creditor may claim forthwith against him. But, does this mean that because of this waiver he becomes a principal debtor? Section 1822 of our Code thus seems to indicate, but doctrine has consistently maintained that although the surety may lose his benefit of application he does not thereby lose his quality as a surety. This doctrine has been ratified by our jurisprudence, which has held:

(a) That notwithstanding the several obligation, of a surety with the principal debtor, the contract does not lose its own nature thereby. (Judgment of December 29, (1898).

(b) That as a result thereof, the several surety retains against the debtor all the rights and actions appertaining to him by reason of the contract of suretyship (Judgment of April 21, 1931). The same is not true with regard to the debtor *in solidum*, himself, whose claim against his co-debtors is limited to the share pertaining to each one in the obligation, with interest on the amounts advanced (Section 1145, par. 1)."

To be a true and correct translation of the original
Certified

(s) RAFAEL RAMIREZ DE ARELLANO JR
Court Interpreter and Translator
United States District Court